(1) Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

PEGGY DIERKING
Petitioner

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent

MOTOROLA, INC.,
Respondent Employer

MATRIX,
Respondent Carrier

On Petition For Writ Of Certiorari
To The United States Supreme Court

PETITION FOR WRIT OF CERTIORARI

PEGGY DIERKING
pro se
P.O. BOX 1231
SONOITA, AZ 85637
(520) 455-4705

23 pp

QUESTIONS PRESENTED FOR REVIEW

1. Have petitioner's Fourteenth Amendment rights been violated due to the State of Arizona failing to follow the Americans with Disabilities Act (ADA) of 1990?
2. Are workman's compensation supportive medical maintenance benefits associated with Regulation 1630.4(c) of the ADA which deals with rates of pay or any other form of compensation and changes in compensation?
3. Have petitioner's rights been violated under the Equal Protection Clause of the Fourteenth Amendment?
4. Did the Administrative Law Judge and the Chief Administrative Law Judge deprive the petitioner of her rights?
5. Although the petitioner's case was denied by both the Arizona Court of Appeals, and the Arizona Supreme Court, were the petitioner's constitutional rights denied by not sending the case back to the Industrial Commission of Arizona?
6. Is it a violation of the Equal Protection Clause of the Fourteenth Amendment that the State of Arizona uses a generic-naming treatment for all individuals, referring to everyone as "employees," rather than distinguishing between injured, and impaired/disabled classifications of individuals, especially when these individuals are no longer "employees" of the companies in question?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURTS

The names of all parties appear in the caption of the case on the cover page.

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PAGE NUMBER: n/a

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS

Decision of Arizona Supreme Court Denying Review
No. CV-00-0335-PR

Decision of the of Arizona Court of Appeals Division Two
No. 2 CA-IC 99-0045

Decision of the Industrial Commission of Arizona
No. 89139-068727

JURISDICTION

The basis for jurisdiction in this Court is that the Arizona Supreme Court denied the petitioner's case on February 8, 2001, consequently denying her constitutional rights. The Arizona Supreme Court upheld the lower courts which had denied the petitioner the equal protection of the laws by denying her right to have an independent medical exam (IME) in Tucson, thereby forcing her to go to Phoenix for an IME.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision which was violated was the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

Also involved is the Americans with Disabilities Act of 1990 (ADA), as well as ADA Title I, Regulation 1630.4 Discrimination Prohibited.

STATEMENT OF THE CASE

The petitioner received a seven percent unscheduled permanent partial disability (another source said a 7% total body impairment), as well as supportive medical maintenance benefits as a result of an on-the-job injury, April 27, 1989, at Motorola, Inc. (Scottsdale, Arizona), due to no fault of the petitioner (the company was at fault). The award, which originated in 1991, was never of a monetary nature, and consisted of a maximum of twelve physical therapy/myofascial release treatment visits per year and a maximum of six office visits per year for management of cervical residuals. The need for the specialized myofascial release treatment visits was documented in various records including those of the Industrial Commission of Arizona. The award was renewed in 1992, 1993, and 1998.

However, in October 1998, the insurance carrier, Matrix (Motorola, Inc. is self-insured) demanded to have the petitioner seen for an independent medical exam (IME) in Phoenix, and also demanded that the petitioner be seen before the petitioner's impending move could take place. The inability of the petitioner to handle long drives had been documented. After numerous attempts to have the IME scheduled in Tucson, the petitioner filed a Motion for Protective Order which was denied by the Chief Administrative Law Justice (ALJ) on December 16, 1998. Matrix had suspended the petitioner's supportive medical maintenance benefits on December 15, 1998; petitioner then attended the IME in Phoenix; Matrix then terminated her supportive medical maintenance benefits on January 6, 1999 as a result of the IME report dated December 23, 1998.

A hearing was held on April 26, 1999 at which time the petitioner's doctor testified; a second hearing was held on May 5, 1999 at which time the IME doctor testified (the petitioner's attorney didn't want her present during the second hearing). The ALJ entered his Decision Upon Hearing Findings and Award Suspending and Terminating Supportive Care Benefits, July 15, 1999. The petitioner then

filed the Decision for Review in August 1999 which was denied by the ALJ in October 1999.

A Petition for Special Action was initiated with the Arizona Court of Appeals, Division One, by the petitioner in November 1999, then transferred to Division Two (in Tucson) in December 1999. This Court of Appeals issued a Memorandum Decision in April 2000 affirming the Arizona Industrial Commission of Arizona's award, and also denied a Motion for Reconsideration. A Petition for Review was filed and denied by the Arizona Supreme Court on February 8, 2001.

The State of Arizona failed to follow the guidelines of the ADA, and has violated the petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment. The Chief ALJ violated the petitioner's rights by denying the Motion for Protective Order; the ALJ violated the petitioner's rights by ignoring any possible ADA/equal protection reference to the case, as he refused to set aside the suspension of benefits and he adopted the opinion of the IME doctor over that of the petitioner's own doctor. The Appeals Court and the Supreme Court violated the petitioner's rights as well, since either Court could have sent the case back to the Industrial Commission of Arizona.

The petitioner now looks to the U.S. Supreme Court for assistance in her pursuit of equal protection under the laws.

REASONS FOR GRANTING THE PETITION

The petitioner relied upon and trusted the Arizona judicial system to correct its manifest error, the denial of her constitutional rights. In her quest for equal protection under the laws in Arizona, she was met with 100% rejection.

When the State of Arizona failed to follow the guidelines of the ADA, and also violated the petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment, a series of events was noted: the Chief ALJ violated the petitioner's rights by denying the Motion for

Protective Order; the ALJ violated the petitioner's rights by ignoring any possible ADA/equal protection reference to the case, as he refused to set aside the suspension of benefits and he adopted the opinion of the IME doctor over that of the petitioner's own doctor. Both the Appeals Court and the Supreme Court violated the petitioner's rights as well, since either Court could have sent the case back to the Industrial Commission of Arizona.

If the U.S. Supreme Court will grant the Petition, the petitioner will have attained a portion of her goal, to pursue equal protection under the laws.

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Appendix A: Decision of the Arizona Court of Appeals Division Two, No. 2 CA-IC 99-0045, April 20, 2000

Appendix B: Decision of the Industrial Commission of Arizona, No. 89139-068727, July 15, 1999, cited excerpt.

Appendix C: Decision of Arizona Supreme Court Denying Review, No. CV-00-0335-PR, February 8, 2001

Appendix D: Decision of Industrial Commission of Arizona Denying Motion for Protective Order, No. 89139068727, December 16, 1998

FILED BY CLERK
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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

PEGGY DIERKING,	)	2 CA-IC 99-0045
	)	DEPARTMENT B
Petitioner Employee,	)	
	)	MEMORANDUM
	)	DECISION
v.	)	Not for Publication
	)	Rule 28, Rules of Civil
THE INDUSTRIAL COMMISSION OF ARIZONA,	)	Appellate Procedure
	)	
Respondent,	)	
	)	
MOTOROLA, INC.,	)	
	)	
Respondent Employer,	)	
	)	
MATRIX,	)	
	)	
Respondent Insurer.	)	
	)	

SPECIAL ACTION – INDUSTRIAL COMMISSION
ICA Claim No. 89139-068727
Insurer No. 890623
Jerry C. Schmidt, Administrative Law Judge
AWARD AFFIRMED

Peggy Dierking — Sonoita
In Propria Persona

The Industrial Commission of Arizona
By Anita R. Valainis — Phoenix
Attorney for Respondent

Long, Lundmark & Poppe, P .A.
By Kerrie A. Simpson — Phoenix
Attorneys for Respondents
Employer and Insurer

H O W A R D, Judge.

¶1 In this statutory special action, petitioner/employee Peggy Dierking challenges the administrative law judge's (ALJ) award concluding that respondent/employer Motorola and respondent/insurer Matrix were justified in temporarily suspending her supportive care benefits because she had unreasonably refused to attend an independent medical examination and in subsequently terminating her benefits because she did not need supportive care. Because the evidence reasonably supports the award, we affirm.

BACKGROUND

¶2 We view the evidence in the light most favorable to sustaining the award. *Rent A Center v. Industrial Comm'n,* 191 Ariz. 406, ¶1, 956 P.2d 533, ¶1 (App. 1998). In Apri1 1989, Dierking was injured moving office furniture while employed by Motorola. Her claim was accepted for benefits and ultimately closed with a seven percent unscheduled permanent partial disability and supportive care benefits.

¶3 In October 1998, Matrix sent a notice to Dierking stating it had scheduled her for an independent medical examination (IME) on October 29. *See* A.R.S. § 23-1026. Dierking objected to that appointment date as inconvenient. She suggested November 11 as one of two alternate dates, which Matrix accepted. On November 2, Dierking told Matrix she would be moving on November 11 and asked it to reschedule that appointment to December 17. Matrix

denied this request. On November 9, Dierking confirmed to Matrix that she "could and would attend" her November 11 IME. But, on November 10, she told Matrix she could not attend the IME because "she had an emergency regarding her moving situation" and her husband could not drive her. Thereafter, Matrix suspended Dierking's supportive care benefits pursuant to § 23-1026(C).

¶4 The IME was again rescheduled for December 23. After the ALJ denied Dierking's motion for a protective order regarding that appointment, Dierking was seen by Dr. Kevin S. Ladin, who concluded she did not need further supportive medical care. Accordingly, Matrix terminated supportive care benefits in January 1999.

¶5 Dierking filed timely hearing requests for both the suspension and the termination of her benefits. After a two-day hearing, the ALJ concluded that Dierking's benefits had been appropriately suspended and terminated. He affirmed that decision on review and this special action followed.

DISCUSSION

I. Suspension of Benefits

¶6 Dierking insists her supportive care benefits should not have been suspended because Matrix refused to reschedule the November 11 appointment on November 2 and because she canceled the November 11 IME due to an emergency. "If the employee refuses to submit to the medical examination or obstructs the examination," an insurance carrier may unilaterally suspend benefits until the employee submits to the medical examination. § 23-1026(C). Because the imposition of this type of sanction has been deemed to be in the nature of an affirmative defense, the insurer has the burden of proof. *Garza v. Industrial Comm'n,* 17 Ariz. App. 525, 530, 498 P.2d 599, 604 (1972). But we will not reverse the award if it is supported by any reasonable interpretation of the evidence. *Rent A Center.*

¶7 The evidence here supports the conclusion by the ALJ that Dierking had refused or obstructed the examination.

Dierking objected to the October 29 IME date solely because it was inconvenient, and Matrix accommodated her objection. On November 2, Dierking requested the IME be continued again because it was inconvenient due to her moving.[1] Matrix was unwilling to reschedule it then because it had already rescheduled the appointment once, to a date Dierking had selected, and because it wanted Dierking evaluated before she moved. After confirming on November 9 that she would attend, Dierking called on November 10 and stated she would not attend because her husband could not drive her. The carrier offered to pay Dierking's bus fare or reimburse a family member or neighbor to drive her to Phoenix for the examination. Even when the examination was rescheduled for December, Dierking again objected to attending.

¶8 The ALJ could conclude from the evidence that Dierking had shown a pattern of refusing to appear for the examination. Further, because the ALJ is the sole judge of witness credibility, *Glodo v. Industrial Commission,* 191 Ariz. 259,262,955 P.2d 15, 18 (App. 1997), he properly determined the merit of Dierking's various reasons for not attending. Because Matrix presented sufficient information that Dierking had obstructed the IME and that it had grounds to suspend her benefits under § 23-1026, *Garza,* on which Dierking relies, is inapposite. 17 Ariz. App. at 530,498 P.2d at 604 (insurer presented no evidence to support suspension).

¶9 Dierking also suggests that the ALJ was confused about the sequence of events surrounding the suspension of her benefits and her motion for protective order. But Dierking's motion for protective order was filed to change the location of her December 23 IME and was unrelated to her November 11 appointment, which ultimately led to her benefits' suspension. This argument, therefore, does not change our conclusion.

---

[1]Dierking did not, at this point, object to the \place of the examination as inconvenient.

II. Termination of Benefits

¶10 Dierking also contends the evidence did not justify the termination of her supportive care benefits. "In reviewing the sufficiency of the evidence to support the ALJ's findings, we first note that conflicts in medical evidence must be resolved by the trier of fact." *Carousel Snack Bar v. Industrial Comm'n,* 156 Ariz. 43, 46, 749 P.2d 1364, 1367 (1988). We defer to the ALJ's findings and uphold the award if it is supported by any reasonable inference from the medical testimony. *Lou Grubb Chevrolet, Inc. v. Industrial Comm'n,* 174 Ariz. 23, 28, 846 P.2d 836,841 (App. 1992).

¶11 Dr. Beeley, Dierking's treating physician, and Dr. Ladin, the IME physician, testified about Dierking's need for ongoing supportive care. To the extent that their testimony conflicted, the ALJ adopted Dr. Ladin's opinion as more probably correct. Dr. Ladin testified that he saw no need for ongoing supportive care, particularly the "passive" type that Dr. Beeley was providing because it did not require Dierking's participation and would not likely lead to her independent management of her symptoms. Furthermore, although Beeley clearly recommended ongoing supportive care, he also described his treatment modalities as passive and concluded that the objective clinical effect of his treatments was "slow and minimal at best." This evidence supports the ALJ's determination that Dierking's benefits had been properly terminated.

¶12 Dierking also challenges the ALJ's adoption of Dr. Ladin's opinions, arguing that he was biased because he was affiliated with Motorola. Dr. Ladin went to Motorola once a week to see patients and had treated many Motorola employees in his private practice. Any bias arising from this relationship would affect the weight, not the admissibility, of the evidence. *See Maricopa County v. Barkley,* 168 Ariz. 234, 240, 812 P.2d 1052, 1058 (App. 1990). And, "it is the function of the administrative law judge to resolve conflicts in the medical evidence, including questions involving credibility and bias." *Gomez v. Industrial Comm'n,* 148 Ariz. 575, 576, 716 P.2d 32, 33 (App. 1985). The ALJ did so here,

stating that the medical experts' "conscious or unconscious bias or interest" was one of many factors he had considered in resolving the conflicting testimony. Dierking has therefore failed to show that the ALJ should not have considered Dr. Ladin's testimony.

¶13 Dierking further complains that Dr. Ladin did not discuss her physical therapy records in the report of his IME. Although Dr. Ladin did not mention the records at the hearing, his IME report mentioned them, and he also testified that he did not believe supervised physical therapy was necessary. Dierking's claim, therefore, is not supported by the record.

¶14 Lastly, Dierking claims for the first time that the hearing process was procedurally flawed because her attorney had discouraged her from attending the hearing at which Dr. Ladin testified and she was, therefore, unable to insure that Dr. Ladin was questioned about her concerns "surrounding the examination of her cervical spine. "Because our review is properly limited to those claims that were before the ALJ and Dierking did not raise this issue below, we do not address it. *See Calixto v. Industrial Comm'n,* 126 Ariz. 400, 402, 616 P.2d 75, 77 (App. 1980) (failure to raise issue before ALJ precludes appellate review). Likewise, we do not address any issues that Dierking raises for the first time in her reply brief. *See Associated Grocers v. Industrial Comm'n,* 133 Ariz. 421, 424, 652 P.2d 160, 163 (App. 1982).

¶15 The award is affirmed.

s/_____
Joseph W. Howard, Judge

Concurring:

s/_____
Philip G. Espinosa, Chief Judge

s/_____
J. William Brammer, Jr., Presiding Judge

CITED EXCERPT

Decision Upon Hearing and Findings and Award Suspending and Terminating Supportive Care Benefits

Before The Industrial Commission of Arizona

ICA Claim No.	89139068727
Social Security #	526-84-0990
Ins. Claim No.	890623
Date of Injury	04/27/1989
Received	July 16, 1995

page 4

7. ARS Sec. 23-1026C provides that a self-insuring employer is authorized unilaterally to suspend compensation and medical benefits of an employee who unreasonably refuses to attend an independent medical examination. The reason given by the applicant for her inability to attend the independent medical examination is insufficient to set aside the suspension.

8. There exists a conflict in the opinions and testimony of Drs. Beeley and Ladin as to the necessity for further supportive care. With consideration being given (sic) to the above stated criteria this conflict is resolved by adopting Dr. Ladin's opinion and testimony as being more (continued on page 5) probably correct and well founded.

Supreme Court
STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231
TELEPHONE, (602) 542-9396

Noël K. Dessaint
Clerk Of The Court

Kathleen E. Kempley
Chief Deputy Clerk

February 9, 2001

RE: PEGGY DIERKING vs INDUSTRIAL COMM/MOTOROLA/MATRIX
Arizona Supreme Court No. CV-00-0335-PR
Court of Appeals Division Two No. 2 CA-IC 99-0045
Industrial Commission of Arizona No. 89139-068727

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 08, 2001, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

A panel composed of Chief Justice Zlaket, Justice Feldman, and Justice McGregor participated in the determination of this matter.

Record returned to Court of Appeals, Division Two, Tucson, this 9th day of February, 2001.

Noel K. Dessaint, Clerk

TO:
Peggy Dierking
Anita R. Valainis, Chief Counsel,
Industrial Commission of Arizona
Kerrie A. Simpson, Long Lundmark & Poppe PA
Joyce A. Goldsmith, Clerk, Court of Appeals,
Division Two, Tucson West Publishing
Lexis-Nexis

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THE INDUSTRIAL COMMISSION OF ARIZONA
ADMINISTRATIVE LAW JUDGE DIVISION

P .0. BOX 19070
PHOENIX, ARIZONA 85005-9070

Gay Conrad Kruglick, Chairman
Mike Petchel, Vice Chairman
Luis Rodriguez, Member
Jean Pierre Angelchik, M.d., Member
Sandra Grunow, Member

Harriet L. Turney
Chief Administrative Law Judge
800 W. Washington Street
(602) 542-5241
Fax (602) 542-4135

Larry Etchechury, Director
Teresa Hilton, Secretary

December 16, 1998

Pat McPherson
Senior Claims Administrator
The Matrix Companies
11225 N. 28th Dr., Ste. D-220
Phoenix, AZ 85029

RE: MOTION FOR PROTECTIVE ORDER
Applicant: Peggy Dierking
ICA Claim No. 89139068727
Social Security No. 526-84-0990
Carrier Claim No. 090623AH
Date of Injury: 04/27/89

Dear Parties:

Applicant's Motion for Protective Order is denied.

Sincerely,

s/_____
Harriet L. Turney
Chief Administrative Law Judge

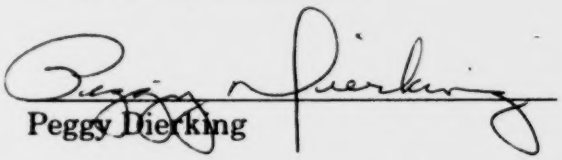
Itm

cc: Karen Hamilton-Ellerman
ICA Claims Manager

CONCLUSION

The Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,



Peggy Dierking

Date: May 7, 2001